

Summary of Revised Chapter 91 Regulations

On Wednesday, March 1, 2007, Governor Deval L. Patrick announced new initiatives to improve the efficiency and effectiveness of environmental regulation in Massachusetts without compromising environmental protection. Among these initiatives was the formation of four task groups to analyze permitting processes conducted by MassDEP that typically take more than six months to conclude and to identify means to expedite those permit processes. Licensing under chapter 91, which is a requirement of economic development projects located in filled and flowed tidelands was one of the four permit processes targeted for improvement.

In accordance with Governor Patrick's directive, in the Spring of 2007 MassDEP convened an stakeholder group to discuss options for streamlining, from both a process and regulatory standpoint, to reduce the timelines associated with licensing decisions while still protecting and ensuring public access to waterfront resources. Specifically, the stakeholder group discussed mechanisms to improve the role and timing of agency participation in license proceedings and the MEPA process, the potential for improved permitting pathways, including establishment of standards (e.g. minimum standards for applications submitted and standards for extended license terms), the need for clarifying the definition of water-dependent uses to address offshore renewable energy, and other agency process and resource improvements.

The proposed revisions to the waterways regulations, 310 CMR 9.00, as well as a complementary change to the adjudicatory hearing regulations at 310 CMR 1.01, were developed with input from that group as well as from other advisory groups and state agencies over the Summer. These regulatory changes implement Governor Patrick's directive to reduce timelines for permitting without compromising environmental standards.

This summary of the proposed revisions is intended to assist the public in reviewing the draft regulations and is organized by topic.

Appeals

M.G.L. c. 30A, section 10A was revised as part of the Permit Streamlining Act, Chapter 205 of Acts of 2006. Revisions to 310 CMR 9.17(1)(c) and 310 CMR 1.01 harmonize the regulations with the revised statute which requires that 5 members of the 10 person group filing an appeal reside in the same municipality as the project and that all appellants submit an affidavit affirming they are part of the 10 person group.

Renewable Energy

This proposal includes revisions specific to renewable energy projects, including wave, current and tidal energy facilities have been added to the list of presumptive water-dependent uses. Underwater cables and conduits delivering electricity, and telecommunications from outside Massachusetts are included in the list of water-dependent uses. Recognizing that wind resources are greatest offshore, in coastal areas, as well as in high elevations, wind turbine projects that require an EIR are considered water-dependent unless the Secretary makes a contrary finding in an EIR; other wind turbine projects are presumptively water-dependent, unless the Department determines otherwise. In addition, the proposal includes an exception for wind turbine projects from the categorical prohibition against nonwater-dependent projects in flowed tidelands. See 310 CMR 9.02, 310 CMR 9.12(2) and 310 CMR 9.32. These regulatory changes are intended to bring the waterways program regulations up to date with evolving uses of Massachusetts' coastal resources and to implement Governor Patrick's commitment to renewable energy.

Enforcement in Landlocked Tidelands

310 CMR 9.08(3) is proposed to implement the recently passed landlocked tidelands act, Chapter 168 of the Acts of 2007 (the "Act"). The Act authorizes the Department to enforce relevant conditions required by the Secretary in a MEPA certificate for projects proposed within landlocked tidelands.

Coastal Zone Management ("CZM")

Revisions to the relevant sections of the regulations would limit CZM's formal review of nonwater-dependent applications to those where: 1) the Department requests CZM participation; or 2) the Secretary has identified a coastal zone project in a final MEPA Certificate as warranting CZM's formal participation. House Bill 847, "An Act to Streamline c. 91 License Applications and Coastal Planning" proposes a similar change. CZM could still comment informally on other projects during the public comment period. See 310 CMR 9.13(1)(a)(4); 310 CMR 9.13(2); 310 CMR 9.13(3)(g); 310 CMR 9.14; 9.17; 310 CMR 9.34(2)(b)(3); 310 CMR 9.54.

Existing Structures after ACEC Designation

Revisions to the categorical restrictions in 310 CMR 9.32(1)(e) will allow existing structures to remain eligible for licensing if they existed prior to the effective date of the ACEC designation. The revision clarifies a change to the regulations made in 2000 that distinguished between existing and proposed structures. The 2000 regulation provided that structures built after 1990 would not be eligible for licensing unless found to be consistent with a Secretary-approved Resource Management Plan. See 310 CMR 9.32(1)(e), 310 CMR 9.07(3)(b)(1) and 310 CMR 9.10 (1)(a).

Housekeeping Revisions to the Waterways Regulations

Application Fees

The regulations include a chart of application fees that needs to be updated to reflect the latest revisions to the fee regulations. Rather than insert the present application fees, a reformatted table is proposed to identify the Department's fee regulations for each permit category. As is the case with other programs, this change would allow application fee change(s) to be implemented through the fee regulations without requiring the waterways regulations to be revised each time. The proposal also identifies the Occupation Fees in the two columns that are presently blank to avoid confusion. See, 310 CMR 9.16 TABLE 1- FEES.

Recording Licenses

To improve compliance, the proposed regulations elaborate on the requirement that the Department receive notification of license recording by specifying that the documentation should be submitted within 30 days of recording. This timeframe is consistent with similar requirements in other Department regulations. See 310 CMR 9.18(2).

Other Clarifications

The proposed revisions also include several minor clarifications, editorial edits and Scrivener errors. They are as follows:

Application Requirements 310 CMR 9.11(2)(b)- due to computer errors, the Review Schedule chart at page 280 contained a misprint in the 4th column regarding the # days from the Notification Date.

310 CMR 9.32(2)(c) - correct spelling of encroachment by adding an "r."

Renewal of Simplified License 310 CMR 9.10(6) – eliminate the specific fee amount and replace it with the citation of the fee regulations for that permit category.

Notice Requirements 310 CMR 9.13 – the 2000 revisions resulted in an internal inconsistency at 310 CMR 9.13(1)(a)(6).

Variance Provisions 310 CMR 9.21 - the 2000 revisions resulted in an internal inconsistency between 310 CMR 9.21(1)(c)(3), 310 CMR 9.21(3) and 310 CMR 9.21(2)(1)(7).

Update Agency Names – to reflect the name changes, replace references of "DEM" to "DCR" and "EOEA" to "EOEEA" and "Department of Fisheries,

Wildlife, Environmental Law Enforcement” to “Department of Fish and Game”, and “Energy Facilities Siting Council” to “Energy Facilities Siting Board” found at 310 CMR 9.02, 310 CMR 9.12(2)(c)(1), 310 CMR 9.13(1)(a)(4), 310 CMR 9.13(2), 310 CMR 9.13(3)(g), 310 CMR 9.14(6)(c), 310 CMR 9.17(1)(f), 310 CMR 9.40(2)(b), and 310 CMR 9.54(2).

310 CMR 9.11(3)(b)(3) – correct the citation for final plans.

310 CMR 9.33(1)(q) – replace “Energy Facilities Siting Act” with its successor, the “Energy Restructuring Act” and update the citation.

310 CMR 9.35(3)(b)(2)(b) – correct phrasing so it reads “public passage thereon.”

310 CMR 9.35(4)(b) – replace the phrase “private recreational berthing facility” with “private recreational boating facility.”

Revise Effective Date of the Regulations at 310 CMR 9.09 – final regulation will identify sections revised and effective date.

Non-Regulatory Streamlining

Application Streamlining

In addition to regulatory changes, the Department has clarified the application forms for nonwater-dependent applications. In the interest of expediting review, this application guidance provides a comprehensive summary of the plan and application information required to commence, and then to complete, the license application review process.